

APR 21 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Guidelines for Evaluating the)
Environmental Effects of) ET Docket No. 93-62
Radiofrequency Radiation)

To: The Commission

REPLY COMMENTS
OF THE
NATIONAL ASSOCIATION OF BUSINESS
AND EDUCATIONAL RADIO, INC.

The National Association of Business and Educational Radio, Inc. ("NABER"), by its attorneys, in response to the Notice of Proposed Rule Making ("NPRM"), FCC 93-142 (released April 8, 1993), herewith submits its Reply Comments in the above-referenced proceeding.¹

I. Introduction

On January 7, 1994, NABER submitted Comments in this proceeding wherein NABER generally supported the proposed guidelines recently accepted by the American National Standards Institute ("ANSI") in association with the Institute of Electrical and Electronic Engineers, Inc. ("IEEE"), which is referred to as ANSI/IEEE C95.1-1992. NABER's Comments also expressed support for low-power exclusions, and requested the

¹ The date for filing Reply Comments in this proceeding has been extended through April 25, 1994. See, Order, DA 94-161 (released February 18, 1994).

Commission to develop reliable testing and measurement procedures in this area of regulation.

Numerous parties have filed Comments to request that the Commission issue a declaratory ruling to delineate the limitations of local and state regulatory authorities over Federally-licensed communications facilities with respect to RF Radiation guidelines.² For the reasons set forth below, NABER submits these Reply Comments in support of the issuance of a Federal Preemption declaratory ruling.

Local Ordinances

Conflicts between the current RF Radiation guidelines and individual state and local guidelines are becoming increasingly prevalent. Since 1988, the State of Massachusetts has enforced its own RF Radiation regulations, which establishes exposure limits, exclusions, and measurement procedures. See generally, 105 Code of Massachusetts Regulations §§120, 122, et. seq. Many of NABER's members have had a difficult or impossible time trying to comply with both federal and Massachusetts RF radiation regulations.

In December 1993, the New Jersey Department of Environmental Protection and Energy ("DEPE") issued a sweeping set of proposed regulations that would require owners of mobile radio transmitters and cellular base stations to

² For example, parties that filed Comments in support of Federal Preemption include Celpage, Inc., The Telecommunications Industry Association, Pactel Corporation, CBS, Capital Cities-ABC, Greater Media, Tribune Broadcasting, and McCaw Cellular Communications, Inc.

register and pay annual fees for each antenna, antenna array, or base station, and indicated that its proposed regulations address concerns about possible health hazards related to exposure to non-ionizing RF and microwave radiation. See, *DEPE Docket No. 60-93-11/42, PRN 1993-650*. Many of these proposed regulations either duplicate or frustrate current or proposed federal RF radiation guidelines.

As more and more states decide to enter this area of communications regulations, federal regulations will be increasingly frustrated and compliance with conflicting regulations will become an insurmountable task. Thus, the time is ripe for the Commission to exercise its expertise and authority in this area of regulation.

Relevance of Federal Preemption

Preemption of state and local RF radiation regulations is within the Commission's statutory authority under the Communications Act. The Commission long ago determined that the broad mandate of Section 1 of the Communications Act, 47 U.S.C. §151, to make communications services available to all people of the United States and the numerous powers granted by Title III of the Act with respect to the establishment of a unified communications system, establishes the existence of a congressional objective in this area. See e.g., *Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations*, 59 RR 2d 1073 (1986); *PRB-1 Declaratory Ruling - Amateur Radio Preemption*, 101 FCC 2d 952 (1985).

With respect to the Commission, the Supreme Court has recently observed that:

The FCC has been given broad responsibilities to regulate all aspects of interstate-communications by wire or radio by virtue of §2(a) of the Communications Act of 1934, 47 U.S.C. §152(a), and the Commission's authority extends to all regulatory actions necessary to insure the achievement of the Commission's statutory responsibility. Therefore, if the FCC has resolved to pre-empt an area of valid regulation and if this determination represents a reasonable accommodation of conflicting policies that are within the agency's domain, one must conclude that all conflicting state regulations have been precluded. *Capital Cities Cable, Inc. v. Crisp*, 56 RR 2d 263, 267 (U.S. Sup. Ct. 1984).³

The preemption of state laws may be justified in three ways. First, Congress may expressly exempt state law. See, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Or, Congress may indicate its intent to completely occupy a given field so that any state law encompassed within that field would implicitly be preempted. Such intent could be found in a congressional regulatory scheme, such as the Communications Act vis-a-vis the Federal Communications Commission, that is so pervasive that it would be reasonable to assume that Congress did not intend to permit the states to supplement it. See, *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982). Finally, preemption may be

³ When considering preemption, the Commission must consider two constitutional provisions. The tenth amendment provides that any powers which the constitution either does not delegate to the United States or does not prohibit the states from exercising are reserved to the states. These are the police powers of the state. The Supremacy Clause, however, provides that the constitution and the laws of the United States shall supersede any state law to the contrary. See, Article III, Section 2.

warranted when state law conflicts with federal law. Such conflicts may occur when "compliance with both Federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

Previously the Commission has not hesitated to preempt state and local regulations in cases where such regulations frustrate federal policies.⁴ Because increased local oversight over RF Radiation is adversely affecting a licensee's ability to engage in Commission-authorized activities, Federal Supremacy in the form of preemption must now be asserted.

Preemption is primarily a function of the extent of the conflict between federal and state and local regulation. To the extent state regulations supersede or contradict federal RF radiation regulations and guidelines, they will frustrate the achievement of uniform RF radiation guidelines, and concomitantly make such federal guidelines meaningless. Also, of equal importance, the Commission must consider the economic hardship of complying with conflicting federal, state and local regulations -- many communications operations will expend considerable resources trying to comply with such

⁴ See, e.g., *Louisiana Pub. Serv. Comm'n*, 476 U.S. 355; *American Broadcasting Co. v. FCC*, 191 F. 2d 492 (D.C. Cir. 1951); *Satellite Earth Stations (Preemption)*, *supra*; *PRB-1 Amateur Radio Preemption*, *supra*.

conflicting regulations. In most cases, the expense will be passed along to the consumer. In other cases, the expense will suffocate the business and cause a withdrawal of service to the public. All told, conflicting regulations such as these will prohibit the long term growth of this country's communications industry.

Conclusion

Based upon the foregoing, NABER respectfully supports the issuance of a Declaratory Ruling regarding federal preemption of state and local regulations pertaining to RF Radiation regulations. The Commission should immediately commence rule making proceedings with respect to these matters.

Respectfully submitted,

**NATIONAL ASSOCIATION OF BUSINESS
AND EDUCATIONAL RADIO**

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April 21, 1994